

MOHAN SINGH LACHMAN SINGH

a

v.

PP

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

ABDUL KADIR SULAIMAN JCA

ALAUDDIN MOHD SHERIFF JCA

[CRIMINAL APPEAL NO: W-05-28-1999]

2 APRIL 2002

c

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Dangerous drugs found in accused's room - Whether accused had exclusive possession of room - Whether accused had to show possibility of access by others - Whether prosecution must exclude all possibilities of access by others - Whether accused had custody, control and knowledge of drugs - Whether accused in possession of drugs - Whether safe to convict*

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CRIMINAL PROCEDURE: *Prosecution - Prosecution's case - Burden of proof - Duty to establish every ingredient of charge beyond all reasonable doubt - Failure of defence to contradict an ingredient of charge during cross-examination of prosecution witnesses - Whether prosecution relieved of duty to establish that ingredient*

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EVIDENCE: *Burden of proof - Prosecution's burden - Duty to establish every ingredient of charge beyond all reasonable doubt - Failure of defence to contradict an ingredient of charge during cross-examination of prosecution witnesses - Whether prosecution relieved of duty to establish that ingredient*

f

The accused and two other persons were in a flat when it was raided by the police. The police searched the accused and found two keys on him. The accused then led the police to an adjacent flat unit and one of the two keys was used to unlock the padlock securing its entrance. They then proceeded to one of the six rooms inside that flat unit and used the second key to unlock the padlock securing its door. The following items were found inside that room: (i) packages containing substances which upon chemical analysis later proved to be 156g of heroin and monoacetylmorphines and 335g of cannabis; (ii) a weighing machine, a t-shirt and a pair of jeans, all of which were taken into custody by the police; and (iii) a television and a mattress, which the police did not take into custody. The police made four subsequent visits to the flat unit. On the third visit they gained entry into the room and found the television and mattress in place. On the fourth visit they entered the room and took photographs but discovered the television and mattress missing

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- a* therefrom. The trial judge concluded that the accused had exclusive occupation of the said room on account of the following: (i) both the keys to the flat unit and the room were found on the accused; (ii) the accused had led the police to the room where the dangerous drugs were discovered; (iii) the defence did not suggest to any prosecution witnesses during cross-examination
- b* that someone else had access to the room; and (iv) the evidence of the landlady that the accused had rented the room. The accused was convicted under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. This was his appeal.

Held:

- c* **Per Gopal Sri Ram JCA**

- d* [1] It was in evidence that, in addition to the padlock, the room door also had an automatic lock installed. Despite that, the prosecution did not explain how the police had gained entry into the room when its door was secured with an automatic lock. Furthermore, the television and mattress were both missing from the room on the police's fourth visit. All these led to the strong inference, hitherto unexplained by the prosecution, that someone else also had access to the room. In this context, the fact that the two keys were found on the accused became insignificant. (p 298 b-e)

- e* [2a] Contrary to the prosecution's assertion, the defence did in fact put to a prosecution witness, *ie*, PW3, during cross-examination, that someone else might have had access to the room. This was sufficient to discharge the tactical burden that laid on the accused. (p 298 f-h)

- f* [2b] Nevertheless, even if the defence had failed to suggest to any prosecution witnesses during cross-examination that someone else might have had access to the room, that failure could not, by itself, have relieved the prosecution of its duty to establish the charge against the accused beyond any reasonable doubt. The burden of proving its case at every stage laid on the prosecution. The accused had only to raise a reasonable doubt as to the truth of the prosecution's case. Gaps, if any, in the case for the prosecution could not be filled by resorting to the purported failure of the defence to put specific questions to the prosecution's witnesses. Such gaps had to be filled by the prosecution itself. (pp 298 h & 299 a-d)

- g* [3] In all the circumstances of the case, it would therefore be wholly unsafe to convict the accused upon the evidence standing alone. (p 299 f)

- h* [Appeal allowed; conviction quashed.]

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[Bahasa Malaysia Translation Of Headnotes]

Tertuduh dan dua orang lain berada dalam sebuah pangsapuri apabila ianya diserbu oleh polis. Polis telah memeriksa tertuduh dengan teliti dan terjumpa dua kunci pada tertuduh. Tertuduh kemudiannya membawa polis ke unit pangsapuri yang bersebelahan dan salah satu daripada dua kunci tersebut telah digunakan untuk membuka mangga yang mengunci pintu masuknya. Mereka kemudiannya berjalan ke arah satu dari enam bilik dalam pangsapuri tersebut dan menggunakan kunci kedua untuk membuka mangga yang mengunci pintunya. Perkara-perkara yang berikut telah didapati di dalam bilik itu: (i) bungkusan-bungkusan yang mengandungi bahan-bahan yang setelah analisa kimia dijalankan kemudiannya terbukti merupakan 156g dadah heroin dan monoactylmorphines serta 335g kanabis; (ii) sebuah mesin timbang, sehelai kemeja-T dan sepasang seluar jeans, kesemuanya diambil untuk disimpan oleh polis; dan (iii) sebuah televisyen dan tilam, yang mana telah tidak diambil oleh polis untuk disimpan. Polis telah membuat empat lawatan yang terkemudian ke unit pangsapuri tersebut. Pada lawatan yang ketiga mereka telah dapat memasuki bilik tersebut dan mendapati televisyen dan tilam tersebut masih di tempatnya. Pada lawatan yang keempat mereka telah memasuki bilik tersebut dan mengambil gambar tetapi mendapati bahawa televisyen dan tilam tiada lagi di situ. Hakim perbicaraan telah memutuskan bahawa tertuduh mempunyai hak penghunian eksklusif akan bilik tersebut kerana yang berikut: (i) kedua-dua kunci kepada pangsapuri dan bilik tersebut terdapat pada tertuduh; (ii) tertuduh telah membawa polis kepada bilik di mana dadah berbahaya tersebut dijumpa; (iii) pihak pembelaan tidak menyarankan kepada mana-mana saksi pihak pendakwaan ketika pemeriksaan balas bahawa orang lain boleh memasuki bilik tersebut; dan (iv) keterangan tuan rumah bahawa tertuduh telah menyewa bilik tersebut. Tertuduh telah disabitkan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan dijatuhkan hukuman mati. Ini adalah rayuan beliau.

Diputuskan:**Oleh Gopal Sri Ram HMR**

- [1] Keterangan telah diberikan bahawa, tambahan kepada mangga tersebut, pintu bilik tersebut juga mempunyai kunci automatik yang telah dipasangnya. Meskipun begitu, pihak pendakwaan tidak menerangkan bagaimana polis telah berjaya memasuki bilik tersebut sedangkan pintunya terkunci dengan kunci automatik. Seterusnya, televisyen dan tilam kedua-duanya telah hilang daripada bilik tersebut ketika lawatan keempat polis. Kesemua ini membawa kepada inferens tegas, yang sampai sekarang pun tidak dijelaskan oleh pihak pendakwaan, bahawa ada orang lain yang mempunyai akses ke bilik tersebut. Dalam konteks ini, hakikatnya bahawa kedua-dua kunci tersebut telah dijumpa pada tertuduh menjadi tidak bererti.

- a* [2a] Bertentangan dengan penegasan pendakwaan, pihak pembelaan sesungguhnya telah pada hakikatnya mengemukakan kepada seorang saksi pihak pendakwaan, iaitu, PW3, ketika pemeriksaan balas, bahawa seseorang yang lain mungkin telah mempunyai akses ke bilik tersebut. Ini adalah memadai untuk melepaskan bebanan taktik yang terletak pada
- b*
- c* [2b] Namun begitu, meskipun pihak pembelaan telah gagal untuk menyarankan kepada mana-mana saksi pendakwaan ketika pemeriksaan balas bahawa mungkin ada seseorang lain yang mempunyai akses ke bilik tersebut, kegagalan itu tidak boleh, dengan sendirinya, melepaskan pihak pendakwaan dari tugasnya untuk menentukan pertuduhan terhadap tertuduh di luar sebarang keraguan yang wajar. Bebanan membuktikan kesnya di setiap peringkat terletak pada pihak pendakwaan. Tertuduh hanya perlu membangkitkan satu keraguan wajar berhubung dengan kebenaran kes pendakwaan. Jurang, jika ada, dalam kes pendakwaan
- d* tidak dapat dipenuhi dengan berpaling kepada kegagalan pembelaan untuk mengemukakan soalan-soalan yang spesifik kepada saksi-saksi pihak pendakwaan. Jurang-jurang yang sedemikian haruslah di isi sendiri oleh pihak pendakwaan.
- e* [3] Oleh yang demikian, adalah sesungguhnya tidak selamat untuk mensabitkan tertuduh berdasarkan keterangan yang tidak disokong.

[Rayuan dibenarkan; sabitan dibatalkan.]

Case(s) referred to:

- f* Abdullah Zawawi v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 (*refd*)
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 (*refd*)
PP v. Zahari Yeop Baai [1980] 1 MLJ 160 (*refd*)

Legislation referred to:

Dangerous Drugs Act 1952, s. 39B

- g* For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Nik Ahmad Marzuki Nik Mohamad

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-46-1998]

Reported by Gan Peng Chiang

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JUDGMENT

(oral)

Gopal Sri Ram JCA (delivering the judgment of the the court):

The appellant was convicted on two charges under s. 39B of the Dangerous Drugs Act 1952.

The facts – about which there is no serious dispute – that led to his conviction are as follows. On 3 September 1997, at about 5.30pm, a police raid was conducted at flat No 2-1F, Jalan Gandek, off Jalan Sungei Besi. There were three males in that flat. The appellant was one of them. PW7, who led the raid assisted by his fellow officers, conducted a search of the appellant's person. Two keys were recovered. The appellant then led the police party to another flat No 2-1B. The police officers gained access into that flat by using one of the keys to open the padlock that secured the collapsible grill at the entrance to the flat. That flat had six rooms. The police party and the appellant proceeded to one of these rooms. The police used the second key to gain access to that room by unlocking a padlock that fastened it. In the room they recovered two substances which on chemical analysis proved to be 156 grammes of a mixture of heroin and monoactylmorphines as well as 335 grammes of cannabis.

The search also yielded a weighing machine, a T-shirt and a pair of jeans, all of which the police took into their custody. There were two other items in the room. The police did not take these into custody. These were a television set and a mattress. Apart from the foregoing, no other items belonging to the appellant were found in that room. The appellant was then taken into custody and formally charged. Later the police made four visits to the scene to take photographs. On the third visit they gained access into the room and found the mattress and television set in place. No photographs were taken because they did not have a police photographer with them at the time.

On the fourth occasion, photos were taken. But there is one matter of significance. It is that the bed and television set were no longer there.

At the appellant's trial, evidence was led with a view to prove that the accused had exclusive occupation of the room in question. The learned trial judge concluded that the appellant did have exclusive occupation of the room in question based on four principal considerations. First the keys to flat 2-1B were found on the appellant person. Second, the accused had led the police party to the room in flat 2-1B in which the offending drugs were found. Third, because the defence had not suggested under cross-examination, to any of the prosecution witnesses that someone else had access to the room. Fourth, and last, because the evidence of the landlady, PW8, was to the effect that the appellant had rented the room in question.

- a* Counsel for the appellant has taken us through the salient features of the case for the prosecution and has argued that there are several unsatisfactory aspects and gaps in it. It is sufficient that we give prominence to only what we consider to be the salient points highlighted by counsel in his submission.
- b* The first of these relates to the room itself. As we observed a moment ago, the trial judge found as a fact that the police had gained access to the room in question. But what the finding overlooks is the evidence of PW8. She said that apart from the padlock that secured the door to the room, there was in place an automatic lock fastened to the door. No explanation was given; and this is frankly conceded by the learned deputy who appears in this appeal;
- c* about this second lock on the door to the room. To put the point plainly, the prosecution failed to sufficiently show how the police party gained access to the room when it was secured with an automatic lock.
- The learned deputy however argued that this is not a significant fact. With
- d* respect, we do not agree. If the door was securely fastened and there were only two keys available, then it was surely for the prosecution to explain how access was gained into the room. The fact therefore that two keys were found on the appellant, pales into insignificance.
- The other salient point that we think we ought to address is the fact that the
- e* mattress and television set were no longer in the room on the police party's fourth visit. This leads to a strong inference, unexplained by the prosecution again, that someone else had access to the room. If it was the landlady, then the prosecution should have said so by asking her the relevant questions. This was not done.
- f* Thirdly, there is the direction by the learned trial judge upon the failure of the defence to put to material prosecution witnesses that someone else might have had access to the room. Now, there are two answers to this. In the first place, it must be said in fairness to counsel who conducted the case in the court below, that the point was put to PW3 (Inspector Wan Roslan). That
- g* witness was asked whether the police had investigated this issue, namely if someone else had had access to the room. That question drew a negative response. In our view, in the particular circumstances of the present case, that was sufficient to discharge the tactical burden, if any, that lay on the accused. The second answer lies in the judgment of Edgar Joseph Jr. FCJ in *Alcontara a/l Ambrose Anthony v. Public Prosecutor* [1996] 1 CLJ 705 at p. 718, where
- h* he said:
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Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put such of its case to the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or from the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

To that learned observation we would merely add this. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. That has always been the law. It is still the law.

We have scrutinised the judgment of the learned trial judge with much care and attention. We are satisfied upon such scrutiny that the learned judge failed to take into account several unsatisfactory features in the case. Had he done so, we are not in doubt that his final conclusion would have been in the appellant's favour.

This is a case therefore, which in the words of so learned a judge, as Hashim Yeop A Sani J, (as he then was), in *Public Prosecutor v. Zahari bin Yeop Baai* [1980] 1 MLJ 160 one in which:

... it would be wholly unsafe to convict upon such evidence standing alone
...

Our duty therefore plainly lies before us.

The appeal is allowed. The convictions on both charges are quashed. We order the appellant to be set at liberty forthwith.

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